IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8403 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KARSANBHAI LALA HARIJAN

Versus

WESTERN RAILWAY

Appearance:

Ms.Nita Banker, for MS SAROJ J PARMAR,
for Petitioner

MRS SIDDHI D TALATI for Respondent No. 1

RULE SERVED for Respondent No. 2

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 07/12/2000

ORAL JUDGEMENT

The matter has already been admitted and with the consent of the parties, the matter is taken up for final

hearing today.

Heard learned counsel Ms. Nita Banker for Ms. Parmar and Ms.Talati for the Railway Administration.

The petitioner herein has raised an industrial dispute, which was registered as Reference (ITC) No.5 of 1989 before the Industrial Tribunal (Central) at Ahmedabad. The petitioner was the Second Party and the respondent herein was the First Party in the aforesaid dispute. It is the say of the petitioner that the action of the Railway Administration in terminating his services was not justified.

The petitioner was serving at Bajwa in Wagon and Carriage Department under the Western Railway, Baroda Division. According to the petitioner, the Railway Administration stopped giving him any work from 19.5.1982 and that the enquiry against him was conducted ex parte and according to him, therefore, the aforesaid order of termination was illegal and unjust and he was not afforded reasonable opportunity to defend himself in the enquiry. He, therefore, prayed that he should be reinstated in service with full back wages.

The Competent Authority referred the aforesaid dispute to the Industrial Tribunal (Central), Ahmedabad for adjudication under the provisions of Section 10(1)(d) of the Industrial Disputes Act, 1947. The respondent herein, who was the First Party in the said Reference, filed the Written Statement at Exhibit 13. It was stated that the Reference was not maintainable and that the Western Railway was not the employer. It was also stated that the Reference is barred by delay and laches and is not tenable in law. It was also further stated that the petitioner was engaged at Bajwa in the year 1982 and was removed on 24.11.1982. It was also stated that the so-called dispute arose in the year 1982 and the dispute is raised and referred in the year 1989, i.e. after lapse of seven years. It was stated that the petitioner was subjected to charge-sheet for remaining absent unauthorisedly from 3.5.1982. It is also the say of the Railway Administration that since the petitioner remained absent unauthorisedly from 3.5.1982 onwards, as per the D.A.R. Rules, the First Party was compelled to issue charge-sheet vide letter dated 25.8.1982 and that the Second Party did not submit any explanation and ultimately, Enquiry Officer was appointed and the concerned workman had not participated in the enquiry and ultimately, penalty order was passed, by which he was removed from service. It was also stated in the Written

Statement that the workman himself had not participated in the enquiry though sufficient opportunity was given to him to attend the enquiry proceedings and ultimately, the Enquiry Officer found that the charges against him regarding remaining absent unauthorisedly is proved and that the Disciplinary Authority accepted the finding of the Enquiry Officer and accordingly, aforesaid penalty of removal from service was passed on 24.11.1982. The said finding was sent to the workman by registered post and the same was also received by him. It was pointed out that in view of the aforesaid circumstances, order or removal was not illegal or unjust or that it was against the principles of natural justice. On these and such other grounds, the aforesaid Reference was resisted by the First Party.

The Industrial Tribunal, after recording the evidence and after hearing both the sides, allowed the said Reference partly and the punishment regarding removal was set aside and instead, the Tribunal substituted the said penalty by an order of discharge.

The aforeaid order of the Industrial Tribunal is impugned in this Special Civil Application at the instance of the present petitioner.

It was argued by the learned counsel for the petitioner that by the aforesaid substituted penalty, the petitioner will not get any benefit as no retirement benefit is available to such employee, who is subjected to a penalty of discharge order. According to her, the petitioner is completing his 60 years of age on 10.1.2001 and that by the impugned order of the Industrial Tribunal, he will not get any benefit and the same will remain as a paper order.

Mrs. Talati, appearing for the Railway Administration, on the other hand, has stated that if there was an order of removal or dismissal, then, as per the Rules of the Railway Administration, retirement benefits by way of pension can be given if special reasons exist for conferring such benefit, but since there is no such provision in the case of discharge from service, the present petitioner will not be given any benefit of retirement dues, etc. According to her, if the order of discharge is substituted to removal or dismissal, then the Administration can consider her case for giving pensionary benefit if any representation to that effect is made. According to her, even otherwise, the petitioner was guilty of delay and laches, as after the order of removal, he waited for about 7 years before

raising industrial dispute and in that view of the matter, the order of the Tribunal is not required to be interfered with.

At this stage, it is pertinent to note that the impugned order of the Tribunal was challenged by the Railway Administration by way of Special Civil Application No.5711 of 1999. The said petition was summarily dismissed by a learned Single Judge and against the said order, L.P.A.No.593 of 2000 was filed by the Railway Administration. A Division Bench of this Court, while dismissing the appeal, has observed as under :-

> "... From the order of the Tribunal it transpires that the delinquent had put in long years of service with the Railways. The Tribunal in para 13 of its order while holding that the delinquent had remained absent unauthorisedly from 3.5.1982 to 10.10.1982 also found on perusal of the inquiry report that this was the first instance that the concerned workman had remained absent and he was not a workman who habitually remained absent. This Court in case of Sardarsingh Devisingh v. DSP Sabarkantha District & Ors., reported in 26(2) GLR 1368 in the context of absence of a police constable for 150 days and his being imposed a penalty of dismissal has held that when an authority is concerned with the power to inflict one of the several penalties such as censure, reprimand, fine, stoppage of increments, reduction in rank, removal or dismissal, the choice of imposition of penalty cannot be arbitrary and must depend on the nature of the misconduct established in a given case. It was observed that just as a road roller cannot be brought to crush a fly, extreme penalty of dismissal cannot be inflicted for misconduct which is not equally grave. In the present case the employee who had put in serval years of service was absent for the first time a little over 3 months and, therefore, the order of the Tribunal reducing the punishment from removal to discharge, which has been challenged by the delinquent himself in a separate writ petition, can hardly provide any ground for challenge to the appellant. There is no scope for the

> appellant to argue that the punishment of dismissal or removal ought to be retained against the employee for having remained absent for the first time in his long tenure of service. Since even the discharge order is challenged in a separate petition, which is pending, we are not making any further observation in this appeal as regards the propriety of imposing even that punishment. This appeal is, therefore, summarily dismissed .... "

Now, therefore, so far as the first contention of Mrs. Talati regarding delay in making Reference is concerned, the said ground was negatived in the Special Civil Application preferred by the Railway Administration, which was dismissed summarily, and even the Letters Patent Appeal is also dismissed and now the said ground cannot be allowed to be canvassed again by the Railway Administration as the same point is concluded in the petition filed by the Railway Administration. The only point which is required to be considered in this petition is whether the substitution of penalty from removal to discharge can be said to be an adequate punishment or even that substituted penalty can be said to be on the higher side looking to the facts and circumstances of the case. Even otherwise, so far as the question about delay in making Reference is concerned, the Supreme Court had an occasion to consider almost an identical question in the decision in Ajaib Singh v. The Sirhind Cooperative Marketing-cum-Processing Service Society Ltd. and another, AIR 1999 SC 1352, wherein delay of 7 years was shown to be existing and admitted by workman. The Apex Court found that the Court can mould relief by refusing back wages or directing payment of part of back wages. The relevant observations of the Apex Court are as under :-

> "... The provisions of Article 137 of the Schedule to Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workmen merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the Labour Court can be generally questioned on the ground of delay alone. Even in a case where the

> delay is shown to be existing, the tribunal, labour Court or board, dealing with the case can appropriately mould the relief by declining to grant back wages to the workman till the date he raised the demand regarding his illegal retrenchment/termination or dismissal. The Court may also in appropriate cases direct the payment of part of the back wages instead of full back wages .... "

In that view of the matter, I do not accept the argument of Mrs. Talati that in view of the delay in making Reference, the order by the Tribunal is not required to be interfered with. As stated earlier, this ground cannot be canvased by the Railway Administration now because the only point which is required to be considered is the propriety of the punishment imposed by the Tribunal. In the case of Sardarsingh Devisingh v. The District Superintendent of Police Sabarkantha District & Ors., 26(2) GLR 1368, this Court has stated as under :-

> "... When the authority is conferred with the power to inflict one of the several penalties such as caution or censure, reprimand, extra drill or duty, fine, stoppage of increments, reduction in rank, removal or dismissal, it is obvious that the authority must give a serious thought to the question of choice of penalty. The choice cannot be arbitrary but must depend on the nature of misconduct established in a given case .... "

In the facts and circumstances of the case and especially as per the say of the Railway Administration by the substituted penalty of discharge, the petitioner will not get any benefit worth the name on his superannuation and considering the misconduct in question, i.e. remaining absent for few months, I think that the penalty of even discharge which is substituted by the Tribunal by exercising its powers under Section 11A of the I.D. Act is on the higher side. It is also not possible to accept the say of Mrs. Talati that I should convert the order of discharge into dismissal so that the petitioner can get some benefit from the Railway by way of pension on special grounds. In the petition which is filed by the employee, I cannot substitute the penalty from discharge to dismissal or removal, which would be a penalty on the higher side.

Now, since the petitioner is retiring within a short period as his superannuation date is 10th January, 2001 and coupled with the fact that by the substituted penalty, no benefit is available to the petitioner worth the name and the same would only remain as a paper order and considering the fact that the misconduct was not of a grave nature and that even during the past, as stated by the counsel for the Railway, he had not committed similar misconduct or that he was not in the habit of remaining absent and considering the peculiar facts of the case that the petitioner is now worst off in the sense that if the removal order was confirmed, he would have got some pensionary benefits if he can show special reasons and circumstances for the same, and since the said benefit is not available in case of discharge and considering the overall aspects and circumstances of the matter, the order of penalty which is substituted by the Industrial Tribunal is required to be interfered with and according to me, this is not a case where the petitioner should have been completely sacked from the employment and in view of the aforesaid circumstances, the petitioner is ordered to be reinstated in service without benefit of back wages for the entire intervening period, however, with continuity of service. He will, however, be entitled to regualr wages from the date of the order of the Labour Court till he is reinstated in service.

In view of what is stated above, the order of the Labour Court is required to be substituted and the concerned workman is ordered to be reinstated in service with all the benefits except benefit of back wages. He is, therefore, entitled to all his retirement dues treating him as in continuous service of the Railway Administration. He will, however, be entitled for regular wages from the date of the order of the Labour Court till he is reinstated in service. Over and above the same, in order to see that the concerned workman may not go unpunished, punishment of withholding of one increment without future effect is also inflicted on him.

The order of the Labour Court is substituted to the aforesaid extent. Petition is accordingly allowed partly. Rule is made absolute to the aforesaid extent with no order as to costs.

The respondents are directed to comply with this order as expeditiously as possible at any rate within 15 days from the date of receipt of the order of this Court.

7th December, 2000 (P.B. Majmudar, J.)

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(apj)